United States Court of Appeals

for the Second Circuit

APPELLEE'S PETITION FOR REHEARING

74-1222

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UNITED STATES COURT OF APPEALS

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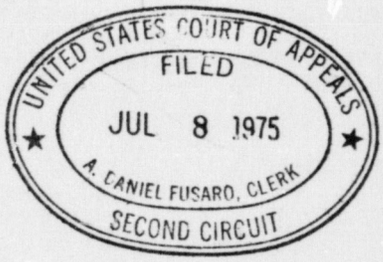

Docket No. 74-1222

FRANK GRASSO,

Petitioner-Appellee,

-v.-

JOHN J. NORTON, Warden, Federal Correctional Institution, Danbury, Connecticut, et al.,

Respondents-Appellants.

PETITION FOR REHEARING

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF CONNECTICUT

PETITION OF THE

PETITIONER-APPELLEE

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Preliminary Statement

The petitioner-appellee Frank Grasso, pursuant to Rule 40, F.R.App.P., petitions this Court for a rehearing in Grasso v. Norton, Slip Op. 4291, (2d Cir., June 23, 1975). The petition is directed to the three judge panel that decided the case, Circuit Judges Feinberg and Mulligan and District

Judge Frederick Van P. Bryan. In the event the panel denies a rehearing, the petitioner suggests, pursuant to Rule 35, F.R.App.P., that a rehearing in banc is appropriate and requests that the petition be considered as an application for such a hearing. See, In re Grand Jury Investigation of Violations of 18 U.S.C. §1621 (Perjury), 318 F.2d 533, 536 (2d Cir.), cert. denied, 375 U.S. 802 (1963); cf. Republic of Italy v. DeAngelis, 206 F.2d 121 (2d Cir. 1953).

Statement of the Case

In its decision in Grasso v. Norton, No. 74-1222 (decided June 23, 1975) this Court affirmed the district court's holding that persons sentenced pursuant to 18 U.S.C. §4208(a)(2) must be given at least as effective and meaningful parole consideration as those persons sentenced pursuant to 18 U.S.C. §4202.[1/] This Court, however, reversed the district court's finding that to receive equal consideration inmates sentenced pursuant to 18 U.S.C. §4208(a)(2) must be given in-person hearings at or near the expiration of one-third of their maximum sentence. This Court held that a "file review" at or near the one-third mark provides the (a)(2) inmate with the required consideration for parole. Judge Feinberg dissented on this issue. His views coincide with those of the District Court in this case, and with those of the United States Court of Appeals for the Seventh Circuit, as expressed in Garofola v. Benson, 505 F.2d 1212 (1974). The district court's order directing the release of the petitioner Frank Grasso from federal custody for failure to comply with the conditional writ of habeas corpus was affirmed.

1/ The appeal in this case was taken by the United States on behalf of the respondents from the decision of the United States District Court for the District of Connecticut (Newman, J.). The opinions of the district court are published at 371 F. Supp. 171 and 376 F. Supp. 116 (D. Conn. 1974). The District Court and this Court agreed that equality of parole treatment for all federal prisoners is required by the statutory scheme; therefore neither court felt obliged to decide whether this equality is also guaranteed by the Due Process Clause of the Fifth Amendment to the Constitution of the United States.

By this petition for rehearing, the petitioner requests this Court to reconsider Part III of its decision reversing the district court and to hold instead that an (a)(2) inmate must be given an in-person hearing at or near the expiration of one-third of his sentence.

The issue on which the petitioner requests a rehearing is one of exceptional importance. It concerns the special sentencing alternative provided by 18 U.S.C. §4208(a)(2) and therefore affects the sentencing decisions and practices of United States District Judges. It affects district judges' expectations of the (a)(2) sentencing alternative and therefore their purpose and intention in imposing (a)(2) sentences. See Grasso v. Norton, Slip Op. 4291, 4302 and 4314-4315 (2d Cir., June 23, 1975) (Feinberg, J., dissenting at 4314-4315); United States v. Slutsky, Slip Op. 2981, 2994-5, (2d Cir. April 18, 1975).

The issue also vitally affects, as the majority opinion reports, the 87% of those persons receiving (a)(2) sentences, who are continued by the Parole Board beyond the one-third mark of their sentences. Grasso v. Norton, supra, at 4306. Between April 1974 and June 1975 the United States District Court for the District of Connecticut decided at least 67 cases which resulted in the issuance of orders directing that (a)(2) inmates receive in person hearings.[2/] Because the resolution of this case affects many persons other than Frank Grasso and involves a frequently recurring issue, this panel should give special attention to correcting the apparent misapprehensions in the

2/ This figure, obtained from the Civil Docket of that court, consists only of those cases in which court order were actually issued. It does not include those cases in which the prisoner was transferred from the district before his claim was decided; nor does it include cases in which the prisoner's claim was settled administratively or cases in which the prisoner's claim was denied by the court.

June 23 slip opinion.

In the event the panel denies a rehearing, the petitioner suggests, pursuant to Rule 35, F.R.App.P., that for all these reasons a rehearing in banc is appropriate.

Basis for the Petition

Reversing one of Judge Newman's key findings, this Court reasoned that the file review procedure, combined with the initial hearing given (a)(2) inmates shortly after their incarceration overcomes the difference between the type of parole consideration given (a)(2) and 4202 prisoners at the one-third mark of their sentences. Id. at 4310. Petitioner suggests that this holding is based on a misapprehension of the nature and purpose of the in-person parole hearing and the way in which such hearings are utilized by Parole Board hearing examiners.

The error in this Court's opinion is demonstrated by what happened in cases resolved pursuant to the opinion of the District Court. Petitioner has found eight cases in which petitioners were able to obtain court-ordered in person hearings after having been denied parole by a "file review". At four of these in person hearings, prisoners were able to convince parole hearing examiners to reverse their earlier "file review" decisions.

ARGUMENT

EQUAL PAROLE CONSIDERATION FOR (a)(2) PRISONERS REQUIRES AN IN-PERSON HEARING AT OR NEAR ONE-THIRD OF THE SENTENCE

The district court found that (a)(2) prisoners must receive an in-person hearing at or near the one-third mark of their sentences to provide them with parole consideration equal to that afforded regular adult inmates (18 U.S.C. §4202). The district court made this finding only after taking extensive expert testimony on the general hearing procedures of the Board as well as the file review system. Grasso v. Norton, 376 F. Supp. 116, 118 (D. Conn. 1974); Brief for the Petitioner-Appellee at 18, 21. The district court heard testimony from Mr. Peter Hoffman, Research Criminologist of the Board of Parole. Mr. Hoffman helped to develop the Guidelines for Decision Making and his responsibilities include the training and supervision of Parole Board hearing examiners. Judge Newman questioned Mr. Hoffman, probing the nature of the in-person parole hearing and the way in which it is conducted by hearing examiners. Judge Newman heard the testimony of and questioned a caseworker from Danbury F.C.I. about the preparation and composition of the progress report, the primary component of a file review, and explored the file review procedure in detail.

The holding of this Court's majority on the file review issue was based on the belief that rehabilitative progress can be demonstrated by the inmate and determined by the hearing examiners equally well by a file review as by an in-person hearing. Slip op. at 4309-4310. This reasoning

of the majority however, was based on a misapprehension of the manner in which hearing examiners assess and determine rehabilitation and misconceived the importance and the value of the in-person hearing to the prisoner.

A. The Function of the In-Person Hearing

Despite the introduction of the Board's Guidelines for Decision Making, hearing examiners still conduct the in-person hearing as a probing interview, questioning and examining the inmate, and observing his demeanor. See Project, Parole Release Decisionmaking and the Sentencing Process, 84 Yale L.J. 810, 830, 833-41 (1975). The hearing examiners employ their clinical expertise to assess the inmate's rehabilitative progress. The determination of rehabilitation is not made by the examiners merely on the basis of the number of programs an inmate has completed or of activities in which he has engaged. Nor do the examiners rely upon a caseworker's appraisal of an inmate's progress. Rather the examiners make this determination on the basis of far more subtle factors, including the responsibility and maturity of the inmate and his views toward himself, others and his past activities. See Project, supra at 837-841. The role accorded representatives further evidences the examiners' reliance on their own expert judgment of these factors. "While one might hypothesize that representatives would be encouraged to assist in accurate classification [on the Guideline Table], they are instead urged to comment on factors which the Guideline Table has rejected as bases for normal decisions, and which could only serve to justify a decision outside the Guidelines." Project, supra at 839.

To state, as the majority does, that the appearance of the inmate cannot aid the hearing examiners in making an informed decision, Grasso v. Norton, supra, at 4310, is simply incorrect, and disregards the nature of this process and the manner in which hearing examiners assess and determine rehabilitative progress. To make these decisions, hearing examiners use their special skills and experience, just as district courts assess the demeanor and credibility of witnesses. By questioning and observing an inmate and obtaining additional information from his personal representative at the time they are considering paroling him, the hearing examiners can and do go beyond the limitations of a written file report in their attempt to reach an appropriate decision.

B. The Inadequacy of the "File Review" Substitute

The file review given (a)(2) inmates at the completion of one-third of their terms cannot afford them parole consideration equal to that of the 4202 prisoner because it does not allow the examiners the personal contact necessary to explore the subtle factors on which they assess and determine rehabilitative progress. The in-person hearing given (a)(2) inmates at the beginning of their terms, even when combined with the file review at one-third, is no answer. In many instances this first hearing comes before the inmate has completed the prison's classification procedures and before he has any opportunity to determine what his plan for rehabilitation will be. The initial hearing for an (a)(2) prisoner thus becomes a formality, in which the examiners merely place the inmate on the guidelines, and conduct no in-

depth investigation into his rehabilitative progress, because such an investigation is impossible at that time.

The file review procedure has another unfortunate effect, in that the (a)(2) inmate is deprived of the opportunity of having a representative, whether it be an institutional staff member, family relation or close friend, appear before the examiners at the time the inmate can best demonstrate his rehabilitative progress. See Project, supra at 839-841 and nn. 134, 139, 141. The (a)(2) inmate may of course, have a representative at the in-person hearing he receives shortly after being incarcerated, but since representatives are not allowed to assist in the classification of the inmate on the Guideline Table, the (a)(2) inmate's right to a representative is virtually meaningless. See Project, supra at 839.

In summary, one of the major purposes of an in-person hearing (as opposed to a "file review") is to explore in detail reasons for making parole decisions outside the Guidelines. For the (a)(2) inmate, the first in-person hearing comes too early to consider the rehabilitative progress relevant to such a decision. Moreover, for most (a)(2) inmates, there is no second chance.

C. Experience in Actual Cases Shows that an In-Person Hearing Provides More Meaningful Parole Consideration than a Mere "File Review".

The "file review" at one-third of the sentence affords the (a)(2) inmate parole consideration inherently unequal to that afforded someone who receives an in-person hearing at the same point in his sentence. As demon-

strated above, the initial hearing afforded (a)(2) inmates does not cure the inequality. This conclusion is demonstrated by cases in which (a)(2) inmates have received court-ordered in-person hearings shortly after having received a file review. After the decision of the district court in this case, Grasso v. Norton, 376 F. Supp. 116 (D. Conn. 1974) and the Parole Board's adoption of the file review procedure, 28 C.F.R. §2.14(b)(1974), (a)(2) inmates were regularly scheduled by the Board to receive a file review at the one-third mark. Inmates aware of the district court's ruling applied to the court, and in proper enforcement of its decision, the district court ordered in-person hearings for such inmates. Occasionally inmates received a file review at the one-third point, and then applied to the district court, thereby obtaining a court ordered in-person hearing.

The files of the District Court at Bridgeport contain at least eight cases in which counsel for petitioner-appellee can document the relevant administrative actions. In four of those cases the inmates were granted parole at the in-person hearing following a denial of parole by the "file review" procedure.[3/] In one-half of these cases then, inmates who were denied parole on the basis of a review on the record were shortly thereafter granted parole based upon an in-person hearing where the hearing examiners were able to exercise their clinical expertise.[4/]

3/ Pina v. Norton, Civ. No. B-74-217 (D. Conn. June 26, 1974); Layne v. Norton Civ. No. B-74-232 (D. Conn. April 21, 1975); Ponder v. Norton, Civ. No. B-74-291 (D. Conn. Feb. 18, 1975); Jenkins v. U.S. Bd. of Parole, Civ. No. 75-182 (D. Conn.)

4/ Such cases as compose this figure, see n. 3, could not, of course, have existed before the decision of the district court and therefore could not have been included in the record. In fact three of these cases occurred after oral argument in this Court. This Court has the authority to

This 50 percent figure demonstrates what is difficult to explain or convey through the sterile words of legal argument: the important practical difference between a file review and an in-person hearing. These cases show that an in-person hearing is necessary to insure that a prisoner will receive that parole consideration which the statute requires - no less than equality with the regular adult inmate - and to insure that Parole Board hearing examiners will make the most informed release decision possible concerning (a)(2) inmates.

4/ (continued)
take judicial notice of these cases under Rule 201, Judicial Notice of Adjudicative Facts, F.R. Evid., effective July 1, 1975, and applicable to cases commenced before that date but still pending after the affective date. Independent of Rule 201, courts of appeals may take judicial notice of events such as these. See Landy v. Federal Deposit Insurance Corporation, 486 F.2d 139, 150-151 (3d Cir. 1973); United States v. Verlinsky, 459 F.2d 1085, 1089 (5th Cir. 1972)(petition for rehearing); Bryant v. Carleson, 444 F.2d 353, 357 (9th Cir. 1971)(Court of Appeals takes judicial notice of developments since taking of appeal including filing, motions and orders in district court and relevant administrative action); Kirby v. Pennsylvania R. Co., 188 F.2d 793, 745 (3d Cir. 1951); United States v. Rodiek, 120 F.2d 760 (2d Cir.), aff'd by an equally divided court, 315 U.S. 783 (1941), rehearing denied, 316 U.S. 707; cf. Kaliman v. Liberty Mutual Fire Insurance Co., 300 F.2d 547, 549 (2d Cir. 1962); Republic of Italy v. DeAngelis, 206 F.2d 121 (2d Cir. 1953).

Dictograph Products Company v. Sonotone Corporation, 231 F.2d 867 (2d Cir.), petition for certiorari dismissed by stipulation, 352 U.S. 883 (1956), is inapposite. The question there before the court was whether the record before the court of appeals could be supplemented under Rule 10, F.R.App.P. (there Rule 75(h) F.R.Civ.P.) to include evidence which could have been presented to the district court.

CONCLUSION

The "file review" given to inmates sentenced under §4208(a)(2) is inherently unequal to the in-person hearing received at the one-third point by inmates sentenced under regular adult provisions.

Given the intention of Congress in providing the sentencing alternative of 18 U.S.C. §4208(a)(2) and the intention of most judges in imposing sentences pursuant to that section, it is of paramount importance that the rehabilitation of (a)(2) inmates be determined in the most effective manner and that such inmates be provided with an opportunity at least equal to that of the regular adult inmate to demonstrate and present their rehabilitative progress. Grasso v. Norton, supra, at 4314-1315 (Feinberg, J., dissenting); cf. United States v. Slutsky, Slip Op. 2981 (2d Cir., April 18, 1975).

Petitioner therefore urges the Court to reconsider and reverse that portion of its decision in Grasso v. Norton which allows a "file review" rather than an in-person hearing for inmates sentenced under the (a)(2) provisions.

Respectfully submitted,

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CERTIFICATION

This is to certify that a copy of the foregoing Petition for Rehearing has been served by mail, postage prepaid, on Thomas P. Smith, Esq., Assistant United States Attorney for Respondent-Appellant, this 7th day of July, 1975.